No. 78-736

In the Supreme Court of the United States

OCTOBER TERM, 1978

DICK MEYERS TOWING SERVICE, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 577 F. 2d 1023. The district court did not write an opinion.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1978. The petition for a writ of certiorari was filed on November 2, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States is liable for tortious interference with petitioner's contracts.

STATEMENT

In August 1975 petitioner was operating tugboats and other vessels on the Black Warrior River, a navigable waterway in Alabama (Pet. App. 2a-3a & n.1). The United States entered into a contract for construction of a replacement lock for the Bankhead Lock for purposes of improving navigation on the river. On August 11, 1975, the lock failed while under construction and was closed to river traffic for five months (Pet. App. 2a-3a).

Petitioner brought suit in the United States District Court for the Northern District of Alabama under the Federal Tort Claims Act, 28 U.S.C. 1346, alleging that the lock failed because the United States negligently maintained and operated it and because the non-federal respondents were negligent in constructing the lock. It asserted that this negligence caused economic harm to its business.

The district court granted summary judgment for the defendants (Pet. App. 6a-8a). The court of appeals affirmed (Pet. App. 1a-5a), holding that petitioner is seeking to recover for "negligent interference with [its] business expectancies" and that it could not do so under the "rule that merely negligent interference with contract rights is not actionable" (Pet. App. 3a). It also rejected petitioner's contention that tort liability arose because the government was maintaining a nuisance, pointing out that "[r]ephrasing the claim as a public nuisance claim does not change its essential character" as a claim for negligent interference with contract rights (Pet. App. 5a n.4).

ARGUMENT

1. Although petitioner brought its suit under the Federal Tort Claims Act, 28 U.S.C. 1346, the court of appeals held that "[j]urisdiction could also have been founded on the admiralty jurisdiction of the federal courts since the Black Warrior River was stipulated to be a navigable waterway and the tort claims here have a maritime nexus" (Pet. App. 3a n.1). The court of appeals analyzed petitioner's claim under admiralty doctrines (see *Schlesinger* v. *Councilman*, 420 U.S. 738, 742 n.5 (1975)), and petitioner's arguments in this Court also rest on admiralty law (see, *e.g.*, Pet. 9) rather than the Alabama law that would be applicable under the Federal Tort Claims Act (see 28 U.S.C. 1346(b)).

We agree with the court of appeals that petitioner's claim is properly regarded as a suit in admiralty because of its maritime nexus. See *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249 (1972). It is, however, barred by the decisions of this Court holding that admiralty does not supply a right of recovery for negligent interference with contract rights. See *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U.S. 303 (1927).[1]

Petitioner contends (Pet. 29-31), however, that its claim is distinguishable from that of the charterer of the damaged boat who was denied recovery in *Robins*. It asserts that, unlike the charterer, who was harmed only because the boat owner was injured, petitioner's business was directly affected by the allegedly negligent actions of the United States. But, as the court of appeals observed, petitioner "misconceives the basis for denial of recovery

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[1]The present suit also would be barred under the Federal Tort Claims Act, which does not allow recovery for "[a]ny claim arising out of * * * interference with contract rights." 28 U.S.C. 2680(h). This exception categorically excludes "any claim" and therefore applies to both intentional and negligent interference with contract rights. See, *e.g.*, *Small* v. *United States*, 333 F. 2d 702 (3d Cir. 1964); *Dupree* v. *United States*, 264 F. 2d 140 (3d Cir.), cert. denied, 361 U.S. 823 (1959). Petitioner's claim would fail even in the absence of this exception, however, because Alabama does not recognize the tort of negligent interference with business expectations. See *Hennessey* v. *National Collegiate Athletic Ass'n*, 564 F. 2d 1136, 1143 (5th Cir. 1977); *Louisville & Nashville R.R.* v. *Arrow Transportation Co.*, 170 F. Supp. 597, 600 & n.3 (N.D. Ala. 1959).

in the cases following *Robins* * * *. The law has traditionally been reluctant to recognize claims based solely on harm to the interest in contractual relations or business expectancy. The critical factor is the character of the interest harmed and not the number of parties involved" (Pet. App. 5a). Indeed, in *Robins* the Court explicitly stated that the charterer could not recover even if one were to "suppose that the [charterer's] loss flowed directly from [the alleged tort]" 275 U.S. at 308.

Petitioner is wrong in arguing (Pet. 9-24) that the present case conflicts with *In re Kinsman Transit Co.*, 388 F. 2d 821 (2d Cir. 1968). *Kinsman* did not refuse to follow *Robins*, as petitioner argues; the court merely concluded that it could decide the case against the plaintiffs on the basis of "more familiar tort terrain," for the "connection between the defendants' negligence and the claimants' damages is too tenuous and remote to permit recovery" (388 F. 2d at 824, 825).[2]

There is little doubt that the Second Circuit would have denied petitioner's claim in the present case. The *Kinsman* court, in illustrating when damages are "too tenuous and remote to permit recovery," used the example of a driver who negligently causes an accident in a tunnel leading into New York during rush hour. The court observed: "we doubt that damages would be recoverable against the negligent driver in favor of truckers or contract carriers who suffered provable losses because of the delay" (*id.* at 825 n.8). The analogy in the present case, where the

[2]The Second Circuit has since followed *Robins* in a case quite similar to this one, denying recovery for damages allegedly suffered by the charterer of a vessel. See *Federal Commerce & Navigation Co. v. M/V Marathonian*, 528 F. 2d 907 (2d Cir. 1975), cert. denied, 425 U.S. 975 (1976).

United States is alleged to have negligently blocked a navigable river, causing losses to carriers because of delay, is clear.[3]

2. Petitioner also insists that it should be permitted to recover under a theory that the federal government was maintaining a nuisance or violating the Rivers and Harbors Act of 1899, 33 U.S.C. 403. Petitioner is barred from asserting these grounds for recovery because it raised them for the first time in the court of appeals. In any event, because the congressionally authorized construction of the lock would not have been a "nuisance" if carried out with due care, petitioner is merely restating its negligence claim. As the court of appeals held, this "attempt * * * is unavailing" (Pet. App. 5a n.4).

[3]Petitioner urges this Court to overrule *Robins* and analyze "the present case in terms of basic negligence principles [particularly] * * * 'foreseeability of the damages to Petitioner's business expectancy' " (Pet. 22). As our discussion of *Kinsman* establishes, however, petitioner would not establish liability even on "basic negligence principles."

At all events, petitioner exaggerates the scholarly support that exists for the position it espouses. The *Restatement of Torts* does not recognize liability for pecuniary harm caused by negligent interference with the performance of a contract. *Restatement of Torts* §766 & comment d (1939); *Restatement (Second) of Torts* §766B (Tent. Draft No. 14, 1969). And Fleming James, in the article relied on by petitioner (Pet. 18-19) (James, *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 Vand. L. Rev. 43, 46-48 (1972)) generally supports continued application of the rule denying tort liability for economic loss:

> [A] generation or so ago * * * there developed a lively movement in America, mostly among commentators, to expand recovery for indirect economic loss in a way that would bring it more closely into line with the law governing physical injury. * * * This movement, however, was unsuccessful and even lost the support of some of its leading adherents.
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> [T]o those of us who believe in the essential long-run soundness of the judicial process, [this history] suggest[s] that the restrictive rule may represent good sense and that the pragmatic explanation offered in its defense deserves careful consideration. [Footnotes ommitted.]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1979

DOJ-1979-01